

NOV 03 2003

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

Michael N. Milby, Clerk of Court

In re ENRON CORPORATION  
SECURITIES, DERIVATIVE &  
"ERISA" LITIGATION

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§  
§

MDL No. 1446

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MARK NEWBY, et al.,

§

Plaintiffs,

§

vs.

§

CIVIL ACTION NO. H-01-3624  
AND CONSOLIDATED CASES

§

§

ENRON CORPORATION, et al.,

§

Defendants.

§

§

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**UNOPPOSED MOTION FOR CONFIDENTIALITY ORDER**

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U.S. COURTS  
SOUTHERN DISTRICT  
OF TEXAS

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Defendants Credit Suisse First Boston LLC, Credit Suisse First Boston (USA), Inc. and Pershing LLC (collectively, for purposes of this motion, “CSFB”), through their counsel and pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and consistent with the Court’s December 19, 2002 Order (#1192), respectfully request that the Court issue a protective order requiring that the parties treat certain documents in CSFB’s document production as confidential.

### Introduction

On July 2, 2002, Lead Plaintiff served CSFB with its First Request for the Production of Documents. That request contains 80 separate numbered requests for production, many of which have multiple subparts, seeking the production of millions of pages — including documents that contain confidential personal information about current and former CSFB employees and CSFB clients. In its December 19, 2002 Order, the Court determined that “[i]t is incumbent upon the defendants in the case, if they want parts of their discovery protected, to move in good faith for a particularized protective order pursuant to Rule 26(c).” Newby v. Enron Corp., No. H-01-3624 (S.D. Tex. Dec. 19, 2002) (#1192). Consistent with this, CSFB has identified two particularized categories of documents sought by Lead Plaintiff’s broad requests that contain confidential or sensitive personal information: (1) personnel files and other personal information of current and former CSFB employees and (2) consistent with applicable state and federal laws, personal information of CSFB’s individual clients. The few documents in CSFB’s production that fall within these categories have been logged individually in a Confidentiality Log (annexed hereto), which sets forth the reasons why each document should be protected from public disclosure.

Affording this protection to these narrow categories of documents — both of which seek protection for the personal information of CSFB’s employees and individual clients — will result

in protection for only a small percentage of CSFB's production (less than 2%), will not be unduly burdensome to the parties or the Court, and will not interfere with the plaintiffs' ability to pursue their claims.<sup>1</sup> Notably, Lead Plaintiff has reviewed this motion and the annexed Confidentiality Log. After conferring with CSFB, Lead Plaintiff has agreed not to oppose this motion and has not raised any objections to the documents listed on the Confidentiality Log (with respect to the last two entries, which were only recently added to the log, Lead Plaintiff has taken those entries under consideration).<sup>2</sup>

Accordingly, CSFB respectfully requests that the Court enter an order that: (1) designates the above narrowly defined categories of documents, all of which are listed on CSFB's Confidentiality Log, as confidential; (2) prohibits disclosure of such documents to nonparties or to the public; and (3) directs that disclosure of such documents to parties shall be used only for the purpose of prosecuting or defending this litigation. A draft of the order CSFB proposes is submitted herewith.

#### Argument

#### I. THE COURT HAS DISCRETION TO PREVENT DISCLOSURE OF CONFIDENTIAL INFORMATION ON A SHOWING OF GOOD CAUSE.

Federal Rule of Civil Procedure 26(c) provides that a court may, "for good cause shown . . . make any order which justice requires to protect a party or person from annoyance,

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<sup>1</sup> In this motion, CSFB seeks confidentiality protection for two narrow categories of documents. If CSFB agrees to produce additional documents, or if Lead Plaintiff serves additional document requests, CSFB may need to seek protection for other narrowly-tailored categories of documents containing highly confidential commercial or sensitive personal information.

<sup>2</sup> Lead Plaintiff has reserved the right to challenge by motion, at any time, the designation of a particular document by CSFB as "Confidential". If such a motion is made, it would be CSFB's burden to demonstrate under Rule 26(c) that that particular document should be confidential.

embarrassment, oppression, or undue burden or expense”. Fed. R. Civ. P. 26(c). “Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.” Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984); see also Cockrum v. Johnson, 917 F. Supp. 479, 481 (E.D. Tex. 1996). This Court has considered the issue of protective orders on previous occasions, determining it may enter a protective order upon a showing of good cause to protect a party from annoyance, oppression, undue burden or expense. Newby v. Enron Corp., No. H-01-3624 (S.D. Tex. July 9, 2003) (#1548); see also Fed. R. Civ. P. 26(c); Landry v. Air Line Pilots Ass’n, 901 F.2d 404, 435 (5th Cir. 1990).

To demonstrate that good cause exists for the issuance of a protective order, the party seeking the order must show that disclosure of the documents sought to be covered by the protective order will lead to a clearly defined and serious injury. See Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994). Once the party seeking protection demonstrates that the documents sought to be covered by the order are confidential and that it would suffer harm absent a protective order, the party opposing the order must demonstrate (1) the relevance of the material to the case and (2) why unlimited disclosure is necessary. See Am. Standard, Inc. v. Pfizer Inc., 828 F.2d 734, 741 (Fed. Cir. 1987). Accordingly, courts balance the requesting party’s interest in obtaining unfettered access to documents against the responding party’s interest in maintaining the confidentiality of those documents. See Cockrum, 917 F. Supp. at 482; see also Pansy, 23 F.3d at 787-88. As set forth below, the balance of interests here weighs in favor of granting protection for these narrow categories of documents.

II. CONFIDENTIAL PERSONAL INFORMATION SHOULD BE PROTECTED FROM DISCLOSURE TO NONPARTIES AND THE PUBLIC.

CSFB seeks to protect the confidentiality of (1) personnel files, documents related to employment history and other personal information of current and former CSFB employees who are not parties to this litigation and (2) statements and other account information of CSFB's individual clients (many of whom are within the putative classes in Tittle and Newby). These documents contain sensitive personal information and, consistent with applicable state and federal laws, General Order 2002-9 and this Court's March 27, 2003 Order, should be kept confidential.

A. Confidential CSFB Employee Information.

In its Document Requests, Lead Plaintiff seeks documents concerning CSFB's employees' "total compensation", "performance evaluations" and "personal files, expense reports or logs, diaries, notebooks, notes, date books, calendars, appointment books, address books or telephone records". (Doc. Req. No. 31 (Korn Decl. Exh. 1).)<sup>3</sup> As set forth in the Declaration of Peter Calamari, Chief Operating Officer of the Human Resource Department at CSFB, CSFB's personnel files contain private personal information such as employee backgrounds, reviews, salary and compensation information, account information, promotion history, complaints or problems, and medical history. (Calamari Decl. ¶ 2.)<sup>4</sup>

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<sup>3</sup> We have attached certain documents as exhibits to the Declaration of Jeffrey B. Korn, dated October 30, 2003, and filed herewith. Those materials are cited in this memorandum as "Korn Decl. Ex. \_\_\_\_".

<sup>4</sup> Each of the sensitive personnel documents within CSFB's production — including, among other documents, performance evaluations, employee self-evaluations, promotion evaluations, retention authorizations, and compensation determinations — has been individually logged on CSFB's Confidentiality Log.

Within CSFB, special care is taken to ensure that documents containing personnel information, including the documents in CSFB's production, are kept confidential and are only shown to a few people (even within CSFB). (Id. ¶ 3.) Access to these documents is limited, and carefully monitored, because CSFB's employees expect CSFB to maintain the confidentiality of this information. (Id.) Needless to say, CSFB does not disclose the information contained in employee personnel files to anyone outside CSFB. (Id. ¶ 2.)<sup>5</sup>

The harm that could befall nonparty employees of CSFB as a result of public disclosure of their personnel files and private information is, at a minimum, the type of "annoyance [and] embarrassment" Rule 26(c) was designed to prevent. Such harm far outweighs any public interest in this specific category of documents, which is why courts grant protective orders limiting the use and availability of information contained in personnel files. See McDonald v. ExxonMobil Chem. Co., No. Civ. A. H-00-4172, 2001 WL 34109381, at \*2 (S.D. Tex. Dec. 7, 2001) (ordering plaintiff to agree to confidentiality order prior to production of personnel files); Knoll v. Am. Tel. & Tel. Co., 176 F.3d 359, 365 (6th Cir. 1999) ("It is clear that defendants had a valid interest in the privacy of nonparty personnel files and that it was within the district court's power to grant the challenged protective order."); Jepsen v. Fla. Bd. of Regents, 610 F.2d 1379, 1384-85 (5th Cir. 1980) ("[W]hen a trial court orders production of confidential

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<sup>5</sup> In addition, information regarding the nature and amount of personal investments made by CSFB employees constitutes sensitive, personal financial information that is kept confidential by CSFB, and is protected from public disclosure by state and federal law. See Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809 (2003); Tex. Fin. Code Ann. § 59.006 (2003); Securities and Exchange Commission Regulation S-P: Privacy of Consumer Financial Information, 17 C.F.R. §§ 248.1-248.30 (2003).

[personnel] records, it has a duty to limit the availability and use of the documents by carefully drawn protective provisions.”).

In addition to the individualized harm that could befall CSFB’s employees should their personal information be publicly released, Mr. Calamari has identified two particularized injuries that CSFB would suffer should its personnel information be left unprotected. First, if the compensation CSFB pays to its employees were publicly released, other investment banks (with whom CSFB intensely competes for talented employees) would be able to offer superior compensation to entice current or prospective CSFB employees, placing CSFB at a competitive disadvantage. (Calamari Decl. ¶ 4.) Second, employee personnel files contain employee performance evaluations, which have been completed by the employee, and the employee’s peers and supervisors. (Id. ¶ 5.) CSFB relies on candid performance evaluation feedback, in part, to determine promotions and assignments. (Id.) To encourage candid, and sometimes critical, employee performance feedback, CSFB assures its employees that these evaluations will be kept confidential. (Id.) If the confidentiality of these files is not maintained, there is a real danger that employees will not be candid when completing these evaluations.

Notably, this Court, consistent with other courts, in its March 28, 2003, Order recognized the harm caused by public release of nonparty personnel files. Accordingly, it ordered that the personnel files in question be deemed confidential consistent with General Order No. 2002-9. See Newby v. Enron Corp, No. H-01-3624 (S.D. Tex. Mar. 28, 2003) (#83) (ordering personnel files to “be deemed confidential and . . . not be disclosed by [any] person given access to the documents”); see also McDonald, 2001 WL 34109381, at \*1 (citing Morton v. F.H. Paschen, Inc., 1998 U.S. Dist. LEXIS 228, at \*6 (E.D. Pa. 1998)) (“There is a strong public policy against

the disclosure of personnel files.”). We respectfully submit the Court should do the same with respect to CSFB’s employees’ private and personal information.

B. Confidential Individual Client Account Statements.

Lead Plaintiff requests that CSFB produce financial account information from CSFB’s “individual investor” clients. (Doc. Req. No. 70 (Korn Decl. Exh. 1).) State and federal law provide specific protections to ensure that that account information remains confidential. See Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809 (2003) (stating that “a financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information” without consent); Tex. Fin. Code Ann. § 59.006 (2003) (prohibiting financial institutions from releasing customer account information of non-parties without consent); Securities and Exchange Commission Regulation S-P: Privacy of Consumer Financial Information, 17 C.F.R. §§ 248.1-248.30 (2003) (limiting financial institution’s disclosure of nonpublic personal information to nonaffiliated third parties). To the extent CSFB’s production includes client account statements, CSFB has redacted the information required by General Order No. 2002-9. We respectfully submit, however, that additional confidentiality protection should be afforded these documents.<sup>6</sup>

In similar contexts, other courts have afforded the confidentiality protection CSFB seeks here. See Dubai Islamic Bank v. Citibank, N.A., 211 F. Supp. 2d 447, 449 & n.1 (S.D.N.Y. 2001) (finding “good cause for a protective order as required under Fed. R. Civ. P. 26(c)” covering “bank account records of Citibank clients” based on “confidentiality and privacy

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<sup>6</sup> Each of the client account statements within CSFB’s production has been individually logged on CSFB’s Confidentiality Log.

concerns”); see also Cockrum, 917 F. Supp. at 481-83 (granting order preventing discovery of father-daughter letters because of intensely private nature of letters). Indeed, the Tittle plaintiffs have agreed that the production of CSFB account statements for accounts held by individual members of the putative Tittle class should be kept confidential. (Letter from K. DeMasi to S. Berman of 8/2/02, at 1 (Korn Decl. Exh. 2); letter from J. Breckenridge to K. DeMasi of 8/8/02, at 1 (Korn Decl. Exh. 3).) There is no reason to afford less protection to the account statements of any of CSFB’s other individual clients who are not parties to this action. Indeed, as noted above, Lead Plaintiff has agreed not to oppose the treatment of such documents as confidential.<sup>7</sup>

### III. THIS COURT SHOULD ISSUE A PROTECTIVE ORDER BASED ON PRINCIPLES OF COMITY AND CONSISTENCY.

The Court should also maintain the confidentiality of CSFB’s personal employee and client information because the Court in the New York bankruptcy proceeding has entered a confidentiality order with respect to the same documents. See In re Enron Corp., No. 01-16034 (AJG) (Bankr. S.D.N.Y. Oct. 10, 2002) (Order Governing the Production and Use of Confidential Material among the Examiner, the Official Committee of Unsecured Creditors, the Debtors and Non-Parties (Korn Decl. Exh. 4)). Recognizing the need for comity and judicial consistency, courts give deference to other courts’ protective orders covering the same documents. See Holland v. Summit Tech., Inc., No. Civ. A. 00-2313, 2001 WL 1132030, at \*4 (E.D. La. Sept. 21, 2001); Melea Ltd. v. Comm’r, 118 T.C. 218, 222, 225-26 (2002) (incorporating other court’s protective order into its own protective order); Tucker v. Ohtsu

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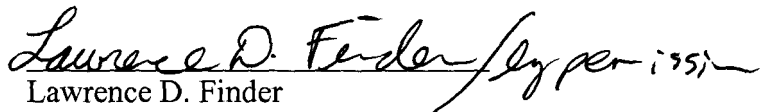
<sup>7</sup> In General Order 2002-9, the Court ordered that “parties shall refrain from including, or shall redact where inclusion is necessary, the following personal identifiers” — social security numbers, names of minor children, dates of birth and financial account numbers. CSFB has complied with General Order 2002-9 by redacting this information.

Tire & Rubber Co., 191 F.R.D. 495, 499, 501-02 (D. Md. 2000) (same). Accordingly, in addition to the reasons set forth above, CSFB respectfully submits that the Court should, in the interests of comity and judicial consistency, grant the protection sought here.

Conclusion

For the foregoing reasons, good cause exists for the Court to prevent disclosure to nonparties of the following categories of documents: (1) personnel files and other personal information of current and former CSFB employees and (2) personal information of CSFB's individual clients. Accordingly, CSFB respectfully requests that the Court grant its Unopposed Motion for a Confidentiality Order, and enter CSFB's proposed Confidentiality Order (submitted herewith).

Dated: November 3, 2003

Handwritten signature of Lawrence D. Finder in cursive script.

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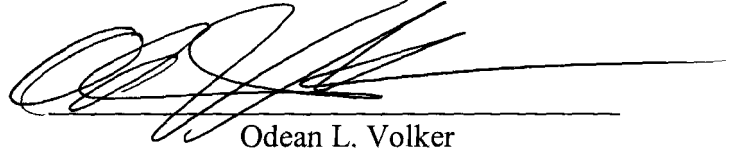
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**CERTIFICATE OF SERVICE**

I hereby certify that, on November 3, 2003 a true and correct copy of the foregoing instrument was served on all counsel on the attached service list electronically via the www.esl3624.com website or as otherwise indicated in the Court's prior orders.

A handwritten signature in black ink, appearing to read 'Odean L. Volker', is written over a horizontal line. The signature is stylized with large, sweeping loops and a long horizontal stroke extending to the right.

Odean L. Volker

The Exhibit(s) May  
Be Viewed in the  
Office of the Clerk